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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:

USA COMMERCIAL MORTGAGE
COMPANY,

Debtor.

Case No. BK-S-06-10725-LBR
Chapter 11

**FIRST OMNIBUS OBJECTION OF
USACM TRUST TO PROOFS OF
CLAIM BASED ENTIRELY UPON
INVESTMENT IN THE COMVEST
LOAN**

Date of Hearing: August 30, 2011
Time of Hearing: 10:30 a.m.
Estimated Time for hearing: 10 min.

The USACM Liquidating Trust (the "USACM Trust") moves this Court, pursuant to § 502 of title 11 of the United States Bankruptcy Code (the "Bankruptcy Code") and Rule 3007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), for an order disallowing the Proofs of Claim listed in **Exhibit A**. These claims were filed by investors ("Direct Lenders") against USA Commercial Mortgage Company ("USACM") based upon an investment in a loan to ComVest Capital Satellite Arms, Inc. (the "Borrower"). This loan was sometimes referred to as the "ComVest Loan" and that is how the USACM Trust will refer to it here. This Objection is supported by the Court's record and the Declarations of Geoffrey L. Berman and Edward M. Burr in Support of Omnibus Objections to Proofs of Claim Based Upon the Investment in the ComVest Loan (the "Berman Decl." and "Burr Decl.").

THIS OBJECTION DOES NOT RELATE TO AND WILL NOT IMPACT THE
DIRECT LENDERS' RIGHTS TO REPAYMENT ON THE COMVEST LOAN, SHARE
IN ANY PROCEEDS GENERATED FROM THE SALE OF THE REAL PROPERTY
SECURING THE COMVEST LOAN, OR SHARE IN THE RECOVERY OF ANY
FUNDS FROM THE GUARANTOR FOR THE LOAN.

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND FACTS

a. The USACM Bankruptcy

On April 13, 2006 ("Petition Date"), USACM filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. Debtor continued to operate its business as debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. Debtor's post-petition management of the Debtor was under the direction of Thomas J. Allison of Mesirow Financial Interim Management, LLC, who served as the Chief Restructuring Officer.

USACM was a Nevada corporation that, prior to the Petition Date, was in the business of underwriting, originating, brokering, funding and servicing commercial loans primarily secured by real estate, both on behalf of investors and for its own account. That business included the solicitation of investors to purchase fractional interest in loans that USACM originated and then serviced. These investors are referred to as "Direct Lenders" in USACM's bankruptcy case and in this Objection.

On January 8, 2007, this Court entered its Order Confirming the "Debtors' Third Amended Joint Chapter 11 Plan of Reorganization" as Modified Herein [Docket No. 2376]. As part of the Plan, and pursuant to an Asset Purchase Agreement filed with this Court, USACM sold the servicing rights to most of the loans it serviced to Compass Partners, LLC and Compass Financial Partners, LLC ("Compass"), including the ComVest Loan. The sale to Compass closed on February 16, 2007.

The USACM Trust exists as of the Effective Date of the Plan, which was March 12, 2007. Geoffrey L. Berman is the Trustee. Under the Plan, the USACM Trust is the successor to USACM with respect to standing to seek allowance and disallowance of Claims under 11 U.S.C. § 502(a).

Upon information derived from filings in the United States District Court, District of Nevada, *3685 San Fernando Lenders Company, LLC, et al v. Compass USA SPE, LLC, et al*, No. 2:07-cv-00892-RCJ-GWF action, the Trust believes that “Silar Advisors, LP (“Silar”) financed Compass’ acquisition of the Purchased Assets, including the loan service agreements in the USACM bankruptcy case and took a secured interest in those Purchased Assets by executing a Master Repurchase Agreement (“Repurchase Agreement”) with Compass, and by filing a UCC-1 financing statement with the State of Delaware.” *Id.* Docket 1250 at 13-14 (citations to declarations omitted).

Further, from filings in the same action, the Trust believes that “Effective as of September 26, 2007, Silar foreclosed on Compass through Asset Resolution LLC (“Asset Resolution”) and took ownership of the Purchased Assets. ... Silar created Asset Resolution as a ‘single purpose entity,’ conveyed all of its interests in the Repurchase Agreement to Asset Resolution, and Asset Resolution properly foreclosed on the assets of Compass, including the Purchased Assets.” (Citations omitted.) Asset Resolution LLC is now a debtor in a chapter 7 bankruptcy case pending in Nevada, case no. BK-S-09-32824-RCJ, along with certain affiliates.¹ William A. Leonard, Jr. was appointed trustee in the Asset Resolution case. By Order entered on July 19, 2010 by the Hon. Robert C. Jones in the Asset Resolution Case, the servicing rights for 19 loans, including the ComVest Loan, were transferred to Cross, FLS.

¹ 10 90 SPE LLC, Fiesta Stoneridge LLC, CFP Gramercy SPE LLC, Bundy 2.5 Million SPE LLC, CFP Cornman Toltec SPE LLC, Bundy Five Million LLC, Fox Hills SPE LLC, HFAH Monaco SPE LLC, Huntsville SPE LLC, Lake Helen Partners SPE LLC, Ocean Atlantic SPE LLC, CFP, Gess SPE LLC, CFP Brookmere Matteson SPE LLC, and Shamrock SPE LLC.

The Trust has attempted to monitor loan collections through monitoring the district court litigation and the Asset Resolution bankruptcy case, but has received limited information concerning servicing and resolution of direct loans by Compass/Silar/Asset Resolution or their successors, including the trustee in bankruptcy for Asset Resolution. The Trust has also been in contract with Cross FLS about the ComVest Loan. The following is the extent of the USACM Trust's information on the current servicing and status of the ComVest Loan.

b. The ComVest Loan

USACM circulated an Offer Sheet to prospective Direct Lenders soliciting funding for an acquisition and development loan to borrowers identified as "ComVest Capital Advisors, Inc."² A copy of the Offer Sheet is attached hereto as **Exhibit B** and incorporated by this reference. (Berman Decl., ¶ 4.) The total loan amount proposed was \$4,500,000. *Id.* The Offer Sheet described the investment as a "First Trust Deed Investment" and noted that the investment would be secured by a first deed of trust on "approximately 60,000 square feet with an apartment complex with a total of 36 units." *Id.* The collateral was located approximately one hour from Orlando, in Satellite Beach, Florida. *Id.* Pursuant to the Offer Sheet, the Borrower was going to purchase the apartment complex and convert them into condominium units. *Id.* The loan to value was 66% "based on estimated retail sell out..." *Id.*³ The Trust's review of the USACM loan files found numerous documents purporting to address the then current value of the collateral. The Trust has not been able to confirm which document(s) were in fact provided to the Direct Lenders. The anticipated loan to value was anywhere from the purported 63% to as much as 113%.

² The loan was ultimately made to a different entity, ComVest Capital Satellite Arms, Inc.

³ Pursuant to the Offer Sheet, an appraisal had been ordered, but the Trustee has not been able to determine whether an appraisal was ever performed.

On January 11, 2006, Borrower made and delivered to various lenders, including the Direct Lenders identified in **Exhibit A**, a “Promissory Note Secured by Mortgage” (the “Note”) and a Loan Agreement. (Berman Decl., ¶ 5.) The Note and Loan Agreement provided for a loan of up to \$4,500,000, with an initial advance of \$3,500,000. *Id.* The USACM records reflect the initial loan was funded; no subsequent advances were made to the Borrower. The Note was secured by a “Mortgage, Security Agreement and Assignment of Rents” (the “Mortgage”) from Borrower in favor of the Direct Lenders, which was recorded in the official records of Brevard County, Florida on January 17, 2006 at Instrument Number 2006013674. (Berman Decl., ¶ 5.) The Note was also supported by an Unconditional Guaranty signed by William Lemke on January 12, 2006. (Berman Decl., ¶ 5.)

The USACM “Loan Summary” dated July 31, 2006 and filed in this case shows that Borrower was “Non-performing” on the Note as of July 31, 2006. (Berman Decl., ¶ 6.) During this bankruptcy case through the transfer of servicing to Compass, USACM treated the Direct Lenders with respect to any interim payments by the borrower in accordance with this Court’s orders and the confirmed Plan.

Counsel for the Trustee had a brief conversation with a representative of Cross, FLS regarding the status of the ComVest Loan. According to Cross, FLS, the Direct Lenders continue to have a secured interest in the collateral and are attempting to sell the Note, although the return is expected to be minimal. The lack of additional funding under the original loan agreement, though not mandatory, may have impacted the value of the underlying collateral.

c. The ComVest Claims

Exhibit A, attached, lists Proofs of Claim filed by Direct Lenders that appear to be based upon an investment in the ComVest Loan. (Burr Decl. ¶ 7.) **Exhibit A** identifies the Proof of Claim number, the claimant, the claimant’s address, the total amount of the

claim and the total amount of the claim that appears to be related to an investment in the ComVest Loan based upon the information provided by the claimant. (Burr Declaration ¶ 7.) The claims listed in **Exhibit A** are referred to hereafter as the “ComVest Claims.” As required by Nevada LR 3007, a copy of the first page of the proof of claim for each of the claims referenced in **Exhibit A** are attached as **Exhibit C**.

II. JURISDICTION

The Court has jurisdiction over this Objection pursuant to 28 U.S.C. §§ 1334 and 157. Venue is appropriate under 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding under 28 U.S.C. § 502 and Bankruptcy Rule 3007.

The statutory predicates for the relief requested herein are 11 U.S.C. § 502 and Bankruptcy Rule 3007.

III. APPLICABLE AUTHORITY

Under the Bankruptcy Code, any Claim for which a proof of claim has been filed will be allowed unless a party in interest objects. If a party in interest objects to the proof of claim, the Court, after notice and hearing, shall determine the amount of the Claim and shall allow the Claim except to the extent that the Claim is “unenforceable against the debtor . . . under any . . . applicable law for a reason other than because such claim is contingent or unmatured.” 11 U.S.C. § 502(b). A properly filed proof of claim is presumed valid under Bankruptcy Rule 3001(f). However, once an objection to the proof of claim controverts the presumption, the creditor ultimately bears the burden of persuasion as to the validity and amount of the claim. *See Ashford v. Consolidated Pioneer Mortg. (In re Consolidated Pioneer Mortg.)*, 178 B.R. 222, 226 (9th Cir. B.A.P. 1995), *aff’d*, 91 F.3d 151 (9th Cir. 1996).

1 **IV. THE OBJECTION**

2 The ComVest Loan appears to have been a legitimate, arms-length transaction. In
3 addition, the Direct Lenders took a known risk by investing in a promissory note secured
4 by a lien on real property.

5 USACM is not liable for the Borrower's default or any decrease in the value of the
6 collateral. Although the subsequent advance under the loan documents was not funded
7 (post petition), the Borrower could have sought additional financing from other lenders.
8 Further, the loan documents did not require additional advances, but allowed for such
9 additional advances. As such, the Trust does not believe the lack of additional advances is
10 a direct cause of the subsequent diminution in value of the collateral securing the Direct
11 Lender loans.

12 The Direct Lenders fail to state a claim because USACM does not appear to have
13 breached the loan servicing agreements with respect to collection of the ComVest Loan.
14 USACM was under no duty to foreclose on the collateral securing the ComVest Loan or
15 take any other action.

16 This objection will not affect the Direct Lenders' right to be repaid on the ComVest
17 Loan by the Borrower, to recover from the sale of any collateral that secured the ComVest
18 Loan, or on the guarantees supporting the ComVest Loan.

19 **V. CONCLUSION**

20 The USACM Trust respectfully requests that the Court disallow the claims against
21 USACM listed in **Exhibit A** in full because those claims are based entirely upon an
22 investment in the ComVest Loan. This objection concerns only claims based upon an
23 investment in the ComVest Loan and not any other claims of any of the Direct Lenders.
24 The USACM Trust also requests such other and further relief as is just and proper.
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1 Dated: July 24, 2011.

2 LEWIS AND ROCA LLP

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11 Copy of the foregoing and pertinent
12 portion of Exhibits deposited in U.S.
13 Mail, first class postage prepaid, on
14 July 24, 2011 to all parties listed on
15 Exhibit A attached.

16 LEWIS AND ROCA LLP

17 s/ Matt Burns
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